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Nos. 87-1022, 87-1112

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE BOARD OF ESTIMATE, *et al.*,

Appellants,

v.

BEVERLY MORRIS, *et al.*,

Appellees.

FRANK V. PONTERIO,

Appellant,

v.

BEVERLY MORRIS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR MUNICIPAL APPELLANTS AND APPELLANT STRANIERE

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QUESTIONS PRESENTED

This is an appeal from a final judgment holding that the equal protection clause cannot accommodate a governing body in New York City which, for nearly a century, has achieved a balance of regional and local interests essential to the effective democratic governance of our Nation's largest city.

Through the New York City Board of Estimate, New York State has successfully accommodated the need for regional planning and delivery of services and the equally important need for local control of decisions which have a peculiarly local impact. Outside observers have called the Board an "institutional miracle" for forming consensus among the City's many diverse interests. On the Board sit three city-wide elected officials who (with two votes each) control the majority of votes and the presidents of the City's five constituent boroughs (who cast one vote each). In declaring the Board's structure unconstitutional, the courts below held that they could not consider either the existence on the Board of the three city-wide officials or the fact that they controlled the majority of votes on the Board. Their holdings were based on the population disparities among the five boroughs and were without regard to the effect of the city-wide officials or the important policies which underlay the Board's design.

The questions presented are these:

1. Does the equal protection clause prohibit a state from delegating essentially non-legislative local powers to a regional board consisting of a) elected representatives from formerly independent political units of unequal population who cast a minority of the Board's votes, and b) representatives of the consolidated regional unit, elected at-large from the entire regional unit, who cast a majority of the Board's votes?

2. Does the equal protection clause require a court, in determining whether the Board's voting structure comports with the principle of one person, one vote, wholly to disregard the representation afforded the voters of all boroughs by the at-large members?

3. Were the courts below correct in finding a sub-state government unconstitutional merely because there are hypothetical alternative structures which could achieve stricter voter equality without regard to the fact that the alternative structures submerge substantial state interests?

PARTIES

Appellees, plaintiffs below, are three registered voters in the City of New York who reside in the County of Kings, better known as Brooklyn.

Appellants are the City of New York, a municipal corporation in the State of New York; the New York City Board of Estimate, a governing body comprised of eight elected officials which operates pursuant to sections 61 and 62 of the New York City Charter; and the eight members of the Board of Estimate. The eight members of the Board are Edward I. Koch, the Mayor of New York City; Andrew J. Stein, the President of the New York City Council; Harrison J. Goldin, the Comptroller of the City of New York; Howard Golden, the President of the Borough of Brooklyn; Fernando Ferrer, the President of the Borough of the Bronx; David N. Dinkins, the President of the Borough of Manhattan; Claire Shulman, the President of the Borough of Queens; and Ralph J. Lamberti, the President of the Borough of Staten Island.

Also an appellant here is Robert Straniere, a member of the New York State Assembly who intervened as a defendant below and who joins this brief.

Frank Ponterio, a resident of Staten Island who intervened as a defendant below, is also an appellant but does not join this brief.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, dated October 8, 1987, is reported at 831 F.2d 384 and appears in the Appendix to the Jurisdictional Statement at page 5.

The decisions of the United States District Court for the Eastern District of New York, dated August 21, 1984 and November 19, 1986, are reproduced in the Appendix to the Jurisdictional Statement at page 119 and page 55 and are reported at 592 F. Supp. 1462 and 647 F. Supp. 1463.

The District Court's rulings came upon remand from an earlier decision of the Court of Appeals for the Second Circuit (May 16, 1983), which held that the New York City Board of Estimate is subject to the one person, one vote principle. This decision, which reversed the initial judgment entered by the District Court,

appears at page 186 of the Appendix to the Jurisdictional Statement and is reported at 707 F.2d 686.

The first decision of the United States District Court for the Eastern District of New York, dated December 1, 1982, appears at page 208 of the Appendix and is reported at 551 F. Supp. 652.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 8, 1987. A Notice of Appeal to this Court on behalf of the municipal appellants was timely served on the parties and filed in the Court of Appeals on October 15, 1987. Intervenor Robert Straniere served and filed a timely Notice of Appeal on November 6, 1987. Intervenor Frank Ponterio served and filed a Notice of Appeal on or about December 15, 1987. Municipal appellants and intervenor-appellant Straniere filed their joint Jurisdictional Statement on December 17, 1987 and intervenor-appellant Ponterio filed his Jurisdictional Statement on December 31, 1987. This Court noted probable jurisdiction on April 4, 1988 and consolidated the appeals.

The jurisdiction of this Court rests upon 28 U.S.C. § 1254(2) in that the Court of Appeals held a state statute to be repugnant to the United States Constitution.

RELEVANT CONSTITUTIONAL PROVISION AND STATE STATUTES

The Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The New York City Charter:

> Section 61: Membership. The mayor, the comptroller, the president of the council, and the presidents of the boroughs shall constitute the board of estimate.
>
> Section 62: Voting in the board.
>
> a. As members of the board of estimate, the mayor, the comptroller and the president of the council shall each be entitled to cast two votes, and the president of each borough shall be entitled to cast one vote.
>
> b. Except as otherwise provided in this charter or by law, the board shall act by resolution adopted by a majority of the whole number of votes authorized to be cast by all the members of the board.
>
> c. No resolution or amendment of any resolution shall be passed at the same meeting of the board at which it is originally presented unless by a three-fourths vote or shall be finally passed except at a meeting open to the public. Prior to a final vote by the board on any resolution or amendment of any resolution members of the general public shall be afforded the opportunity to be heard on such resolution or amendment.
>
> d. A quorum of the board shall consist of a sufficient number of members thereof to cast six votes, including at least two of the members authorized to cast two votes each.

STATEMENT

Introduction

Almost ninety years ago, independent political units in the southeastern part of New York State joined to form what was then, and is now, the largest municipal corporation in the United States. The challenge of that consolidation was, and remains ninety years later, how to accommodate the needs of the local units and the needs of the larger consolidated region. For almost ninety years, the Board of Estimate has been the primary governmental body chosen by New York State to harmonize these sometimes conflicting interests. The Court of Appeals found that this

choice was illegitimate. The Court's finding of unconstitutionality, we submit, was based on an insufficient appreciation of the history, structure and function of the Board and of its role in the development of New York City.

The City of New York

New York City's population of over seven million people is more than twice that of any other American city and greater than all but nine states (JA487, 491).[1] The City's 315 square miles (more than Baltimore, Boston, Minneapolis, San Francisco and Washington, D.C. combined) is one of the largest municipalities in the world. Its population density is the highest of any city in the country. The diversity of that population—the different races, ethnic groups, languages, religions, political groups—is unique. The City has the largest systems in the country for education, health care, welfare, police and fire, sanitation, parks, and housing. The City's annual budget exceeds that of 48 of the 50 states—and many of the world's nations (JA491).

New York is not just an unusually large and diverse city; it is a regional government that delivers more services than any other entity of its kind. Other large cities (such as the next two largest, Los Angeles and Chicago) are themselves parts of larger counties that provide basic services. New York absorbs five counties and assumes more than the sum of the usual functions which counties and lesser political subdivisions elsewhere perform, such as welfare, education, housing and health care. The result is that one central government —administered by a mayor vested with great power—is charged with the delivery of services to and allocation of resources among a large and diverse region.

More than fifty years ago, Walter Lippman described the difficulties of governing New York City (JA73):

> The city is much too big to be governed as a single centralized unit. It is also too varied in its population and its occupations. It is also too old in the traditions of local independence. On the other hand, of course, the interests of the people in all the boroughs are much too closely related not to be dealt with under city-wide and coordinated policies.

1. References to the Appendix to the Jurisdictional Statement will be preceded by the letter "A". Numbers preceded by the letters "JA" refer to pages of the Joint Appendix.

The resolution of this tension—between a need to create fair and efficient systems for the delivery of services and an equally weighty need to assure local autonomy—has been the central challenge of New York City's government since the formation of the Greater City of New York in 1898. The Board of Estimate is the way in which New York has chosen to resolve the tension. It is a unique response to the history, geography, culture and demographics of the city—just as the different governing structures of other localities are specific responses to their histories and needs.

The most important reason for the Board's success, and what makes it unusual, is the presence on the Board of borough representatives and the way in which their minority votes are blended with the majority votes of the city-wide representatives. The presence of borough representatives is not accidental. It is a response to the same factors of history, geography, and the like, which made the Board itself necessary. The boroughs were obvious choices as local units within the regional government. They were (and are) large enough to check the central authority, yet small enough to allow for meaningful expression of local interests.

The Boroughs of New York

New York's five boroughs are, for the most part, creatures of nature: two of them (Manhattan and Staten Island) are surrounded by water; a third (the Bronx) is a peninsula jutting out from the mainland; the other two (Brooklyn and Queens) form part of an island and are divided by the nineteenth-century boundary of the one-time City of Brooklyn. Four of the five boroughs would themselves rank among the ten largest cities in the United States: Brooklyn (with approximately 2.2. million people); Queens (1.9 million); Manhattan (1.4 million); and the

Bronx (1.1 million). The fifth, Staten Island, with more than 350,000 people, roughly equals the population of Cincinnati, Oakland, Tucson, or Minneapolis.

Although they now share a common government, the boroughs have distinct histories, demographics, topographies, and social and economic characteristics. Manhattan is among the financial and cultural capitals of the world; the Bronx is a reviving borough that contains some of the poorest communities in the nation. The least populous of the boroughs, Staten Island, has the greatest amount of undeveloped tracts of land and the second largest inventory of city property (more than Manhattan and Queens combined). Of the most heavily populated boroughs, Queens is known for its stable neighborhoods of one and two-family homes; Brooklyn has an unrivaled cultural diversity.

Upon consolidation of the City of New York, the boroughs became the principal unit of local government. 1896 N.Y. Laws ch. 488, § 1. In the years thereafter, the State effected a slow transition of powers from the boroughs to the City. Until 1962, when the State transferred their remaining powers to the City, the boroughs retained substantial autonomy over local services like streets, sewers and sidewalks (JA63, 72-73). Despite the pooling of powers, the boroughs remain the principal units within the City for the delivery of state and municipal services, for the organization of government and political institutions, and for the expression of local views. The borough governments, headed by an elected president, act as advocates for the boroughs on government services and as conduits between the City and the local communities within each borough.

The City's governmental and political institutions are organized to facilitate this role. The City's essential municipal services—such as its police, fire and sanitation departments— operate within borough units. Major city agencies—on housing, welfare, health care, planning, —maintain offices in each borough. The judicial system—from prosecutors, legal aid, public administrators, and sheriffs to the criminal, civil, family and surrogate's

courts—is organized by borough. So, too, are the political parties, which function exclusively at the borough level; no city-wide Democratic or Republican Party exists in New York. Legislative districts within the City (congressional, state, and city) are drawn to follow borough lines as closely as possible. By law, the City's local school districts cannot cross borough lines (N.Y. Educ. L. 2590-b[2][b] [McKinney 1981]); and each borough has its own college or community college, or both. State law also requires that many of the principal boards and commissions in city government base their membership at least in part on equal borough representation.[2]

The 59 community boards throughout the city are likewise fashioned along borough lines. These boards give advice to city agencies and to the Board of Estimate on local matters. The borough president, partly in concert with the city council members from the borough, appoints the boards to represent community districts drawn within borough boundaries. The boards hold public hearings on budget, municipal service and land use matters, propose community priorities, and prepare requests for city

2. *See, e.g.*, N.Y. Educ. Law § 2590-b(1)(a) (McKinney 1981) (the City's 7-member Board of Education, responsible for the public elementary and secondary school system, must have one representative from each borough); *id.* 6204(2)(f) (McKinney 1985) (the 17-member board of trustees of the City University must have two representatives from each borough); N.Y. Elec. Law § 3-200(3) (McKinney 1978) (10-person City Board of Elections comprised of two representatives from each borough); N.Y. Gen. Mun. Law § 917(d) (McKinney 1986) (15-person City Industrial Development Agency must have one representative from each borough); N.Y. Public Authorities Law § 1204-A(2) (McKinney 1985) (15-member advisory council to the City Transit Authority must have one representative appointed by each borough president); N.Y. Real Property Tax Law § 489-bbb (McKinney 1984) (City Industrial and Commercial Incentive Board, in addition to its regular members, must have one representative from the borough with respect to which the Board is acting); N.Y.C. Charter § 192(a) (Williams Press 1986) (7-member City Planning Commission must have one representative from each borough); *see also* N.Y. Uncons. Laws § 7173(c) (McKinney 1979) (borough president may veto projects within borough proposed by Port Authority of New York and New Jersey.).

Under state law, the boroughs exist as counties: Brooklyn is Kings County, Manhattan is New York County, Staten Island is Richmond County; Queens and the Bronx retain their names.

expenditures. The leaders of these community boards in each borough also sit on the borough board, chaired by the borough president and composed as well of the city council members elected from that borough. The borough boards parallel the activities of the community boards from a borough perspective.

The Board of Estimate

The Board's History: The Board of Estimate's antecedents predate the current City of New York (JA59). In 1864, New York State created a Board of Estimate and Apportionment. Its mandate was to calculate the expenses to be incurred in operating a multi-community police force and to allocate those expenses among member communities that are today part of New York City (*Id.*) This new entity was composed of appointed representatives of the metropolitan police district and of the communities embraced by the district (JA59). This arrangement enabled separate political and geographic units to pool their resources to solve a common problem that crossed then-existing boundaries; it assured that regional needs received priority and yet protected the interests of the individual localities. So successful was this chemistry that, during the next three decades, with various changes in its composition, the Board assumed increasing responsibility over the public fisc (JA60, 61).

In 1898, upon a popular vote, three counties (New York, Kings and Richmond) and parts of three other counties, plus three cities, fifteen towns, parts of three other towns, and numerous individual villages and districts—each of them at the time discharging government functions over a geographic area—joined together to form the Greater City of New York. 1897 N.Y. Laws ch. 378, § 1; *see also* A. Green, *The Greater New York Charter* v (1897). The three existing counties plus amalgams of the other existing subdivisions became the five boroughs of New York. "To fuse the multifarious powers, duties and functions of the various Municipalities concerned, involving as they do the conveniences, the necessities, the nearest interest of 3,000,000 of people into a unit of governmental care and control was a task of no ordinary

magnitude." *Id.* at iv. The distinct characteristics of these communities, and the yearning for a government close to home, posed a formidable obstacle to consolidation. *Id.* at iv-vi. The 1901 Charter Revision Commission recognized that "the vast territory comprised within [New York City] . . . demands some subdivision and some degree of local autonomy" (JA408). To obtain cession of local control to a central government, to persuade people to forgo home rule for the greater good, required some assurance that a meaningful voice responsive to local concerns would be heard on matters having a peculiarly local impact.

The Board of Estimate became the vehicle for expressing that balance.

The Board's Powers: The Board of Estimate is not a legislature. New York City does not have a bicameral legislature. By law, the legislative power in the City resides in its City Council, whose thirty-five members are elected from districts drawn on the basis of population. New York City Charter §§ 21, 22 (Williams Press 1986) [hereinafter, "Ch."]. Enactments of the City Council become law upon approval of the mayor and only the mayor. *Id.* § 38. The Board of Estimate is not a part of that process. With one exception—its limited participation in the budget-making process—the Board has no say in any action the City Council takes. And, with that one exception, the Board cannot exert power of general applicability to all citizens of New York City.

The Board's major areas of responsibility are (1) to make final determinations on the use, development and improvement of land within the City; (2) to approve contracts for municipal services not subject to public bidding; (3) to grant franchises to operate city services or to use city land; (4) to approve the disposition of city-owned land; and (5) to participate in a limited way in the adoption of the City's capital and expense budgets.

By design, the issues over which the Board has exclusive jurisdiction (1-4 above) are highly local. The Board's power to manage city property (Ch. §§ 67[1],[4]; 384) is the power to decide to lease a city building on Webster Avenue in the Bronx to shelter the homeless, or on Christopher Street in Manhattan to care for

AIDS patients, or on East 16th Street in Brooklyn to house low-income families, or on Forest Avenue in Staten Island to supply foster care, or on Queens Boulevard to offer drug counseling. Its power to zone or dispose of land (Ch. §§ 200, 202) is the power to determine that a site on 161st Street in the Bronx ought to be a parking lot, or that a parcel on Yellowstone Boulevard in Queens is suitable for commercial use, or that a strip of waterfront land on Staten Island is suitable for a park, or that Columbus Circle in Manhattan may accommodate a high-rise building. The Board's power to grant contracts and franchises (Ch. §§ 342, 362-73) is the power to purchase day-care services on Lynch Street in Brooklyn, or to buy homemaker services on Effits Street in Staten Island, or to allow a sidewalk cafe in Greenwich Village in Manhattan, or to authorize an intraborough bus franchise along an avenue in Queens, or to provide "meals on wheels" at a Bronx senior citizens center.

None of these decisions affects all citizens of the City alike; each has a special impact on the quality of life in a particular community.

In addition, the Board has a very limited role in the budget adoption process. Here, the mayor is the dominant actor. He alone has the power to propose the budget and to estimate the next year's revenues. Since, by law, the City must have a balanced budget [Financial Emergency Act for the City of New York § 8(1)(a) (N.Y. Unconsol. Laws § 5410[1][a] (McKinney 1979); *see also* Ch. § 1516)], the total expenditures proposed by the mayor cannot be increased unless the property tax is increased; that can be done only by the City Council. Unlike a legislature, the Board has no authority to levy taxes.

The Board has no power to adopt or reject any budget on its own. Rather, after the mayor proposes a budget, the Board and the City Council may each propose changes which "increase, decrease, add or omit" specific units of appropriation, but the proposals are effective only if both bodies agree. Ch. §§ 120(a)(b). Even if the City Council and the Board agree on

changes, the mayor may still veto the changes—a veto that cannot be overridden absent a two-thirds vote of the City Council or the Board; if one body votes to override by a two-thirds vote, the other must approve the override by a majority vote. *Id.* § 121. The Board plays a similar role with respect to the capital budget. *Id.* §§ 222(a); 222(b); 223(c). That budget is largely a collection of particular capital projects each of which has a very local impact—for example, construction of a school playground or reconstruction of a local street.

The Board's assumption of powers and its limited role in the budget process has been the result of evolution and experimentation and has coincided with the removal of powers from the borough governments. The steady transfer of these powers from the boroughs has been important in the process of providing cohesive government to five disparate boroughs. The transfer would not have been successful without a consensus that the Board could exercise such powers and at the same time be sensitive to local concerns. The creation and maintenance of that consensus is attributable in large part to the composition and voting structure of the Board.

The Board's Structure: No one runs for a seat on the Board of Estimate. Membership is one of the prescribed duties of the borough presidents, who are elected by the voters of their respective boroughs, and of three executive officials elected by the entire city: the mayor, the president of the City Council, and the comptroller. On all matters over which the Board has exclusive jurisdiction—that is, all issues except the budget—the three city-wide officials cast six votes (two votes each) and the borough presidents cast five votes (one vote each). In adopting the budget, the mayor, having the exclusive right to propose a budget and veto power over any changes prior to adoption, does not cast a vote as a Board member. In all cases, budget or not, a quorum of six votes must exist consisting of at least two city-wide officials. No action may be taken without a majority of all votes authorized to be cast. In addition, an (unwritten) tradition of borough president deference provides that, on matters peculiarly affecting

only one borough (as a great many matters do), the other borough presidents normally defer to and support the president whose borough the Board's action affects (JA280, 462).

The Board's voting system assures that the Board cannot act without the consent of officials elected by a majority of the City's voters. On non-budget matters, action requires six out of eleven votes. The Board thus cannot exercise these exclusive powers without the vote of at least one person elected by all the City's voters, plus the votes of at least four borough presidents representing at least 70% of the City's population. The presidents of the three less populous boroughs (Manhattan, the Bronx and Staten Island) cannot override the presidents of the two larger boroughs (Brooklyn and Queens) without the votes of at least two of the three officials elected by all city voters. No combination of borough presidents can overcome the collective will of the city-wide officials.

On budget proposals, the process is dominated by the city-wide interests (as embodied in the mayor and the City Council). Five of nine votes (plus the majority of the City Council) is needed to enact changes in the mayor's proposed budget. These changes are not effective unless the mayor "votes" in favor of the changes by not vetoing them. If the mayor vetoes the changes, either five of nine Board votes (if two-thirds of the City Council votes to override) or six of nine (if only a majority of the Council so votes) is needed to effect the change. Thus, even with the mayor's consent, the Board cannot alter the budget without either all of the borough presidents or at least three borough presidents plus an official elected by all the City's voters (and the consent of a majority of the City Council). Only a unanimous vote of the borough presidents (plus at least two-thirds of the City Council) can bring about a change against the will of all the city-wide officials.

The control by the city-wide members of the majority voting power has been basic to the Board's composition from the outset of consolidation. The 1901 charter revision allocated three votes to each of the three city-wide officials, one vote to each borough

president, and, with 88% of the City's population then resident in the two more developed boroughs, one additional vote each to the presidents of Manhattan and Brooklyn (JA63). In 1958, in recognition of actual and anticipated growth in the other boroughs, a charter revision adopted the system that exists today: Each city-wide official was given twice the number of votes (four) as the equal number (two) given to each borough president (JA70); to make the arithmetic simpler, a 1978 charter revision halved each member's vote (Ch. § 62).

Now that so much authority has devolved upon the central authority, equal votes for borough presidents is crucial. The evolutionary transfer of local powers to the city was made possible only by assuring the citizens of each borough that their elected president would have credible and equal voice in the Board's deliberations. At the same time equal votes for borough presidents has been balanced by giving majority control to the city-wide constituency—through city-wide officials and, in the budget process, through them and the City Council. This compromise enabled the State to assuage the concerns of the citizens of the less populous boroughs, override political opposition to regionalism, and achieve the city-wide perspective through consolidation of local powers into a central authority. In effecting and maintaining this compromise, the state took account of the local nature of the Board's powers; the disparate impact of those powers on particular communities; the value of imparting those powers to a compact body of elected officials; the need to assure that no segment of the population be disenfranchised; the importance of equality to a collegial operation that could achieve consensus; and the benefits of using existing borough institutions and officials to facilitate and complement the Board's operation.

The Board's Operation: Usually, history shows, the Board has acted unanimously (JA86-88, 93-95). A three-year study of more than 13,000 Board votes during the first part of this decade showed that 97% were unanimous; a like study over ten years ago produced an almost identical result (JA94), as did one over thirty

years ago (JA285-286). The consensus evidenced by these studies has been essential to the cohesive government of a large metropolitan area (JA94, 103-104, 139-40, 165-167). It is a consensus encouraged by the compact size of the Board, the status of its members as the highest elected officials in the region, the equality accorded to each borough president, the collegiality such equality occasions, the tradition of borough-president deference, and the majority control of the city-wide members. These dynamics of the Board dilute parochialism, invite balanced perspectives, compel reasoned resolution of conflicts between regional and local interests, provide a check on mayoral power, and permit decisive action based on broad popular support (JA74, 276), resulting in what two commentators called an "institutional miracle" (JA285).

The Board's effectiveness has constantly been reaffirmed. Few forms of government anywhere have been subjected to as much official scrutiny as New York City's. Yet the Board's current composition and voting system have consistently satisfied those authorized to examine and alter the structure of city government. Every official study of New York City government in the past eight decades (including the study appellees' own lead expert conducted [JA54-189]) has endorsed the 1901 Charter Commission's view that borough representation is essential to the Board's effective performance of its functions. The studies demonstrated that borough-president representation was important to the city as a whole as well as to the boroughs because administration of the manifold affairs of the city required intimate familiarity with the conditions and needs of the five boroughs. The Board's composition and voting system, these observers concluded, permitted the transfer to the Board of central powers that no other entity could assume. Characteristic is the report of a comprehensive Charter Revision Study in 1975, which concluded:

> The nature of the Board of Estimate has been shaped by special needs which have arisen during particular times in the City's history. Specifically, it has been a magnet for issues that require deliberative judgments in the best interests of the City as a whole, and it has repeatedly been assigned responsibility for sensitive matters . . . that have not been adequately handled by other bodies or officials.
>
> Any charter revision affecting the Board of Estimate cannot lose sight of this incremental assimilation of authority. The Board is not a body devised by esoteric social scientists, but rather an institution forged from the singular historical development and attributes of New York City and its distinct geographic parts. *Preliminary Recommendations of the State Charter Revision Commission for New York City* 84 (1975); *see also* N.Y.C. Charter Revision Commission, *Preliminary Report and Draft of Proposed Charter for the City of New York* 17 (1936).

These government studies have not been inattentive to the population differences among the boroughs. To the contrary, the Board's electoral design assures fair and effective voting power to the City's population. These studies have recognized that the Board's combination of city-wide and borough officials accomplished majority rule with reasonable equality among city voters. Composing the Board solely by reference to population, on the other hand, would effectively disenfranchise significant segments of the population. Every qualified expert (including appellees' own) agrees that allocating the votes on the entire Board based solely on strict population would reduce the people of Staten Island to the status of bystanders in the Board's decision-making (JA166-167; 404-499; 510-511). If such a result were mandated it would become much more difficult for the State to transfer powers from local communities to a central authority and coordinate regional resources based on broad consensus.

The Prior Proceedings

Background: Appellees commenced this action in December 1981. They sought a declaration that the legislation forming the Board of Estimate—sections 61 and 62 of the New York City Charter—infringed their constitutional right to equal representation. They asked for an injunction compelling the City to remedy

this alleged infringement by altering either the composition or the voting system of the Board (JA29-36).

On April 5, 1982, claiming that the Board's composition was illegal *per se* in deviating from the ideal of equal representation by 78% (down from the 153% their complaint alleged using the same population figures), appellees moved for summary judgment (JA42-47). Relying on *Bergerman* v. *Lindsay*, 25 NY2d 405, 306 N.Y.S.2d 898, 255 N.E.2d 142 (1969), *cert. denied*, 398 U.S. 955 (1970), which held that the Board of Estimate was not subject to the principle of one person, one vote, the City cross-moved for summary judgment dismissing the complaint as a matter of law. On December 1, 1982, the District Court granted the City's motion (A208, A228-A229).

On May 16, 1983, the Court of Appeals for the Second Circuit reversed. The Court ruled that, under this Court's decisions since *Bergerman*, any government body whose membership is ultimately determined by popular vote is subject to the principle of one person, one vote. (A186, A196-200). In so ruling, however, the Court declined to hold that the Board's composition violated that principle (A200-201). Rather, the Court remanded to the District Court for a determination whether the Board's makeup offends the equal protection clause (200-201, 205).

The Court of Appeals recognized the uniqueness of the Board and expressly contemplated that the Board's blending of majority votes with minority representation was "one issue to be examined on remand" (A204). The District Court was to determine "the degree of malapportionment present (after deciding on the appropriate methodology for doing so)" (A201). The question of methodology was important because, as the Court of Appeals stated, the "fact that three members are elected at large from the entire city raises novel issues as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative" (A207).

The District Court's Rulings: Upon remand, the District Court bifurcated the issues to consider first the extent, if any, to which the Board's composition deviated from population equality, and then, if a deviation exceeded minimal levels, whether state interests justified whatever variances existed (A122-123).

In the first stage, the City argued that the Board's voting structure assured majority rule. Appellees, who had the burden on this issue, proposed mathematical formulae which purportedly showed material deviations from strict voter equality. Appellees proposed at least six different methods. Some of these methods, like those set forth in their complaint and initial summary judgment motion, purported to calculate the maximum deviation from perfect equality by assigning the six city-wide votes among the five boroughs based on either (1) a percentage of the city population in each borough (producing a deviation of 153%) or (2) actual population (78%) (JA33-35, 47). Yet others of appellees' formulae, which they claimed to derive from *Abate* v. *Mundt*, 403 U.S. 182 (1971), entirely disregarded the city-wide majority voting bloc and purported to compute a maximum deviation (132.9%) based solely on population differences among the boroughs. Still other methods, proposed by intervenor-appellant Ponterio, asserted deviations of between 16% and 30% (JA221-23, 356-57, 360-66).

On August 21, 1984, the District Court chose a version of appellees' "Abate test," and held that the Board deviated from population equality by 132.9% (A119, 138-139). Under this test, all the complexities of the Board of Estimate voting structure—the blending of a majority of city-wide votes and a minority of borough votes—are simply ignored. According to the District Court, the Board's voting system was "unexceptional" and occasioned no "first-impression measurement problems" (A136). The District Court perceived in this Court's jurisprudence an "impatience with mathematical metaphysics" which disfavored "the speculative contamination inherent in injecting the city-wide membership into the inequality calculus." (A131, 161). Accordingly, examining only the deviations derived from the

votes of the borough presidents, the Court arrived at its percentage merely by dividing the City's population into five—obtaining the supposedly ideal population district (1,414,206)—and then adding the percentages by which the populations of the largest borough (Brooklyn) and the smallest (Staten Island) deviated from that ideal (57.7 + 75.2) (163-164). No account was taken of the existence on the Board of the city-wide officials or of their majority voting strength.

Having thus set an extravagant population deviation unrelated to the Board's actual operation, the District Court called upon appellants to justify it. In this second stage, appellants established that the Board's composition and voting system rest on long-standing state policies recognized as valid by this Court (JA382-90), that the Board, as constituted, is "an important and useful part of New York City's government" (JA506), and that it could not be changed without disenfranchising local interests (JA502, 511). Appellees conceded that the Board "is needed" and "works" (JA547). Nonetheless they insisted that untested alternative plans for the Board's composition and voting system would satisfy all "valid" state policies (that is, those policies that appellees believed did not depart from strict population equality) (JA548-49). Abandoning their earlier claim that a system of weighted voting among borough presidents on the Board was "unacceptable" (JA208), appellees now argued that such a system would bring the Board within constitutional limits.

On November 19, 1986, the Court ruled that appellees had failed to justify the adjudged deviation of 132.9% (A55, A112). The Court agreed that the avowed purposes of the Board's composition—facilitating the City's ability to exercise central authority; assuring meaningful representation of local interests on matters primarily of local concern; preserving historical, geographic and political boundaries; maintaining a small, collegial and effective body of the City's highest elected officials; providing a check on mayoral power —are in fact the purposes the Board is meant to serve (A82-97). The Court did not dispute that these were legitimate objectives which the Board's electoral design

fully accomplished. The Court ruled, however, that a state must choose the government alternative that is least restrictive of voting rights (A97-100). The existence of hypothetical government structures with smaller deviations is sufficient to invalidate the existing structure (A109-110). The Court found that there were such hypothetical alternatives and thus enjoined the City to restructure the Board *(id.)*.

The District Court's Method of Measuring the Alleged Deviation from Strict Voter Equality: During the second stage of the proceedings before the District Court, the illogic of its methodology became clear. As noted, the appellees had conceded that the Board, as constituted, served many valid state interests. Nonetheless they claimed that the Board could be structured differently and that these alternative structures, while deviating less from strict voter equality, would not sacrifice any legitimate state interests. Thus, under appellees' theory, it was necessary for them to construct what they believed to be acceptable alternative structures and then to measure the deviations from strict voter equality which the alternatives created.

An examination of these alternatives highlighted the fundamental flaws in the methodology adopted by the District Court during the first stage of the proceeding. As we will explain more fully below (*see* pp. 33-34 *infra*), if, as did the District Court, one ignores the votes of the three city-wide officials and calculates deviations entirely upon the basis of population differences among the boroughs, it is possible to have many weighted-voting systems which produce no significant deviation from "perfect" equality but which, as under the present system, leave each borough president with the same effective voting power as the others.

It was not accidental, then, that when appellees proposed alternative weighted-voting structures, they purported to measure the resulting deviations not based upon simple arithmetical differences in population among the boroughs (as had the District Court during the first stage of the proceedings), but instead based

upon an analysis of the real voting power of the borough presidents (JA535-36; JA567-68). "Voting power" analysis, formulated first by Professor John Banzhaf and used by several appellate courts, examines all the possible voting combinations in a body and then determines in what percentage of these combinations a particular voter can cast the deciding or "critical" vote. That percentage is the measure of the voter's "voting power." According to appellees, "[w]eighted voting under a Banzhaf mathematical model is employed to assure meaningful participation and representation for even the smallest participant." (JA535, see also JA536, 539-543, 555-58).

Appellees, however, did not apply the analysis correctly. Appellees' errors were pointed out by the inventor of the analysis upon which they purported to rely, Professor Banzhaf, in his application to appear as an *amicus* in the District Court (JA621-22). Professor Banzhaf set forth in his amicus brief how his analysis could properly be applied not only to various alternative weighted voting structures proposed by appellees but also to the existing voting structure of the Board.[3]

The Banzhaf Index provides a way to measure, and then to compare, the relative powers of individual voters to affect outcomes on a body such as the Board of Estimate. The analysis proceeds on two levels—first, a determination of the power of each elected representative to affect the outcome of a vote, and second, a determination of the power of an individual voter to affect the election of the representative. In the case of the Board of Estimate, there is an additional step because, with respect to the Board, each voter in a borough draws his or her power from the ability to affect the election of four representatives—three city-wide officials and one borough president. Professor Banzhaf's analysis, which will be more fully explained below (see pp. 34-38, *infra*), confirmed what is in any event apparent. If one properly accounts for the majority votes of the city-wide officials, the deviations from strict voter equality are substantially

3. The District Court would not permit Professor Banzhaf to appear as *amicus* (A114). With the consent of all parties and the approval of the Court of Appeals, he appeared as *amicus* there.

less than the 132% found by the District Court. They are an average and maximum of 7% and 31% respectively (see p. 37, *infra*).

As noted, in spite of the evident flaws in the District Court's methodology—flaws implicitly recognized in appellees' own submissions during the second stage of the proceedings—the District Court ruled as if the Board were made up only of five borough presidents and measured disparities based entirely upon the population differences among the boroughs (A162-64). The Court disregarded the existence and majority voting power of the three city-wide officials. Based on this incorrect analysis, the District Court found a deviation of 132% and ruled that the valid state policies embodied by the Board did not justify such a deviation (A164-74).

The Court of Appeals' Decision: On October 8, 1987, the Court of Appeals for the Second Circuit adopted the reasoning of the District Court and affirmed. Although the Court (per Oakes, J.) recognized that the presence of the city-wide members on the Board might "mitigate somewhat the effects of the deviation in voter equality" (A47), it nonetheless held that, "in calculating voter equality for equal protection purposes the citywide members should be, if not ignored, not considered in the appropriate analysis" (A33). The Court based this conclusion on its view that the borough presidents and the city-wide officials "represent different interests" and that a resident of a particular borough may have an interest *qua* borough resident and another interest *qua* city resident (A32). The Court's analysis, however, simply described the fact that the Board's structure encompasses complex relationships. The analysis provided no grounds for ignoring the complexities in favor of a model which does not exist in reality.

Second, the Court rejected the Banzhaf Index which was found to be "insufficiently realistic" (A24). In particular, according to the Court, the Banzhaf Index, which treats each possible voting outcome as equally likely, ignores such imponderables as partisanship, ethnicity, race, force of personality, voting blocs, or any

other influences that may make one voting combination more likely than another (A 26). However, as the Court itself recognized (A28-29), its own analysis is subject to the same criticism. Indeed, what the Index attempts—along with all other methods of analysis accepted by the courts—is a way of measuring voting power under the assumption that each person's vote is, and should be, the equal of another's.

Finally, the Court adopted, without further analysis, the District Court's view that the existence of hypothetical voting plans with smaller deviations from strict voter equality requires the rejection of the Board's voting structure (with larger deviations) —in spite of the valid state interests justifying that Board's structure (A39).

Judge Newman, though concurring in the majority opinion, wrote separately on the question whether the city-wide votes on the Board should be excluded from consideration (A48). Judge Newman recognized that until this case, "the only cases considering the constitutionality of representation arrangements that combine district representation with at-large representation have involved bodies in which the voting power of the at-large members was a small fraction of the total voting power" (A49). These cases did not control because, "[w]ith the at-large representation so insubstantial, the courts examined only the deviations of the populations of the districts" (A 49-50).

Judge Newman also recognized that, contrary to the earlier cases, in this case, the at-large representation was not insubstantial (A49-51). Indeed, except in the budget process (when the power of the Board is, itself, substantially diminished and is shared with the mayor and the City Council, see pp. 10-12, *supra*), the at-large representatives control a majority of the votes. Judge Newman conceded that "[a]t some point" the voting power of the at-large representatives would become relevant or perhaps even dispositive (A 51). Without any further analysis, Judge Newman stated his conclusion that this case was not at that point (A53).

SUMMARY OF ARGUMENT

The Board of Estimate is a vital instrument of New York City's government. The Board is the body through which New York State has chosen to accommodate many different and sometimes competing interests. Most importantly, it is through the Board that New York has accommodated local needs and the needs of the larger consolidated city. The compromise embodied in the Board's structure has been successful. For almost ninety years the Board has fostered the growth, development, and effective government of our nation's largest city.

Although not disputing the success of this compromise, the courts below found it illegitimate and ruled that the Board of Estimate had to be restructured. The rulings below were not based on a finding of invidious purpose or result. There is no evidence of arbitrary whim, or of gerrymander, or of racial mischief. No facts suggested that the Board was unresponsive to the popular will or the hostage of a narrow minority of the city's populace. Rather the courts below found that the Board's blending of city-wide and local representation is inconsistent with the principle of one person, one vote.

The application of this principle by the courts below violated the basic tenets of this Court's equal protection jurisprudence. This Court has recognized the extraordinary complexity of local governments throughout the United States. The lower courts have been instructed not to apply the one person, one vote principle mechanically in a way that effectively forces all local governmental bodies into the same molds. There is room in the one person, one vote principle for innovation and flexibility.

The courts below did not heed these lessons. Their error may be seen most clearly in the way they analyzed the deviations from voter equality alleged by appellees. The Board of Estimate is a body which, by law, does not have a simple, one-dimensional voting structure like, for example, a typical legislature might have. There is instead a blend of city-wide and borough votes with a system of weighted votes that gives a majority to the city-wide officials.

The courts below did not address the Board's complexities. They thought it more "convenient" to find a simpler mold into which the Board could be squeezed. Accordingly, they ignored the majority city-wide votes and judged the Board as if—contrary to fact—it were a local legislature made up of only five borough representatives. On this basis, the courts below found a deviation from perfect equality (132%) that has no basis in the reality of the Board. The courts below also chose a method of analyzing the justifications for the Board which effectively gave them no weight.

A sounder analysis of the Board (that is, one more attuned to its real voting structure) would show deviations substantially less than those relied upon by the Court of Appeals. Indeed, even these lesser deviations (an average and maximum of 7% and 31% respectively) overstate the alleged harm to appellees. The fact is that under the Board's voting system, its powers cannot be invoked by officials elected by a minority of the voters in the city.

In these circumstances, and taking due account of the need for flexibility in local governments, the deviations from strict voter equality are justified by legitimate state interests. Surely the State of New York has a rational and important interest in creating a body which respects the principle of majority rule, supports the need for regional government, and also accommodates the need to provide a local voice on decisions that have local impacts.

ARGUMENT

THE COMPOSITION AND VOTING SYSTEM OF THE BOARD OF ESTIMATE COMPORT WITH THE CONSTITUTION.

A. The States Enjoy Broad Flexibility To Adopt Rational Electoral Plans For Sub-State Governments Which Achieve Reasonable Voter Equality.

Government, this Court long ago observed, "is the science of experiment." *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 226 (1821). "[S]tate legislatures have constitutional authority to

experiment with new techniques,. . . ." *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952). This authority embraces the power to decide on the "number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised." *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178 (1907). The "extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them" is of "substantial constitutional significance." *Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 71 (1978).

The principle of "one person, one vote" cannot be divorced from these other constitutional principles. "One person, one vote" is not a mindless formula for computing the makeup of governing bodies; it is a standard to define the meaning of voting equality in a representative government. The equal protection clause requires that "a State make an honest and good faith effort" to achieve equality among voters. *Reynolds* v. *Sims*, 377 U.S. 533, 577 (1964). But fair and effective representation "does not depend solely on mathematical equality among district populations". *Gaffney* v. *Cummings*, 412 U.S. 735, 748-49 (1973). Other factors may be essential to achieve the goals of representative government. The Constitution does not "require that the State never distinguish between citizens" in weighing those factors, "but only that the distinctions that are made not be arbitrary or invidious". *Avery* v. *Midland County*, 390 U.S. 474, 484 (1968).

This Court has respected the need for flexibility in its application of the "one person, one vote" principle. Indeed, it has applied different standards depending upon the kind of body being judged. The most stringent standard—derived from Article I of the Constitution—requires "absolute equality" in the apportionment of congressional districts, *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 531 (1969), so that deviations of as little as 1% may be unacceptable, *Karcher* v. *Daggett*, 462 U.S. 725, 732-33 (1983). A less stringent standard of "substantial equality" applies to apportionment of state legislative districts, *Mahan* v.

Howell, 410 U.S. 315, 320-23 (1973), in which deviations of 10% or less need not even be justified, *White* v. *Regester*, 412 U.S. 755, 764 (1973), and valid state policies may justify far greater variances, *Brown* v. *Thomson*, 462 U.S. 835, 846-47 (1983).

The standard for sub-state government institutions has not yet been fully defined by this Court. But in no other area of apportionment law has this Court so emphasized the need for flexibility.

This Court did not determine whether the one person, one vote component of the equal protection clause applied to local or sub-state governmental bodies until several years after it had applied the principle to state legislatures in *Reynolds* v. *Sims*. *See*, *Hadley* v. *Junior College District*, 397 U.S. 50 (1970); *Avery* v. *Midland County*, *supra*, 390 U.S. 474. Prior to deciding that issue affirmatively in *Avery* and *Hadley*, this Court recognized the special needs of local governments and affirmed that the Constitution would not serve to frustrate localities in their ability to deal with local problems. In *Sailors* v. *Board of Education*, 387 U.S. 105 (1967), the members of Michigan's county school boards were selected, not by election, but by appointment. This Court, noting that a legislative office was not involved, held the one person, one vote rule not applicable to the appointive selection of the board members. The Court recognized that "[v]iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation." 387 U.S. at 110-11.

Similarly, in *Dusch* v. *Davis*, 387 U.S. 112 (1967), at issue was a borough form of local government, with all eleven council members elected at-large but with seven of the eleven required to reside in each of the seven different boroughs. This Court, assuming the one person, one vote principle applicable, found no violation despite varying borough populations, because each councilman represented the entire city, not a particular borough. 387 U.S. at 115. Again the Court recognized the distinct and

complex problems of local government, stating that "[t]he Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside". 387 U.S. at 117.

This Court's recognition of the special and complex needs of local and sub-state governments was reemphasized when it explicitly held the one person, one vote principle applicable to local elective bodies. In *Avery* v. *Midland County*, *supra*, 390 U.S. 474, this Court was faced with a "vast imbalance" resulting from the presence of 95% of the county's population in one of the four districts equally represented on the Commissioner's Court. This Court held the one person, one vote principle applicable to what it described as a "unit of local government having general governmental powers over the entire geographic area served by the body." 390 U.S. at 485.

Nevertheless, in *Avery*, as in *Hadley* (where the one person, one vote principle was held applicable to the election of the trustees of a junior college district), this Court cited the *Sailors* and *Dusch* opinions approvingly and reiterated that neither the Constitution nor the Court would serve as "roadblocks in the path of innovation, experiment, and development among units of local government." *Avery* v. *Midland County*, *supra*, 390 U.S. at 485; *accord*, *Hadley* v. *Junior College District*, *supra*, 397 U.S. at 58-59. And, in *Avery*, the opinion on which the Court of Appeals relied in striking down the Board of Estimate's voting scheme (A16-21), this Court reaffirmed the special deference accorded states in fashioning sub-state governing units (390 U.S. at 485):

> This Court is aware of the immense pressures facing units of local government, and of the greatly varying problems with which they must deal. The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems.

Because of this need for flexibility and innovation, as well as the smaller size of local governmental bodies, this Court has recognized that greater deviations on the local level may be tolerated than on the congressional or state legislative level. *Abate* v. *Mundt*, 403 U.S. 182, 185 (1971). Indeed, in reviewing a county legislature in *Abate*, this Court specifically approved a policy of "intergovernmental coordination", there between the county and town levels of government, which, like the Board of Estimate and the policies it fosters, had long-standing historical roots. 403 U.S. at 186.

To give force to these teachings requires a sensitive standard for assessing sub-state institutions. In shaping that standard, the courts should recognize that federal and state legislative bodies are different from local governing bodies which are much more numerous and have more varied powers and purposes. In applying the standard, the courts should permit the state substantial flexibility to consider valid factors which may bear on the special needs of local governments. The states should be paid considerable deference in accommodating these needs with the goal of voter equality. They must be free to pursue rational plans for local government and to make neutral compromises that achieve reasonable parity among voters without risking minority contro' A test that does not adequately account for these special needs—one which equates the design of sub-state governments with federal and state legislative apportionments—will construct "roadblocks in the path of innovation, experiment, and development among units of local government." *Avery* v. *Midland County*, *supra*, 390 U.S. at 485.

There is no reason to construct those roadblocks. The principal danger inhering in malapportioned congressional and state legislative districts is the insulation of a governing body from the popular will. There are, however, important safeguards against this danger at the sub-state level. The broad reforms in state legislative apportionment effected by this Court's decisions since *Baker* v. *Carr*, 369 U.S. 186 (1962) make it less likely that legislatures would tolerate the undue concentration of power in

undemocratic local bodies. Although *Avery* held that this safeguard alone does not exempt local governmental bodies from the one person, one vote principle, it is nonetheless a safeguard that supports a more flexible approach to the application of that principle. As Justice Powell wrote in a concurring opinion, "[I]t may be difficult to decide when experimentation and reasoned compromise have resulted in an impermissible delegation of those governmental powers that generally affect all of the people to a body with a selective electorate. But state legislatures, responsive to the interests of all the people, normally are better qualified to make this judgment than federal courts." *Ball v. James*, 451 U.S. 355, 373 (1981).

Deference to local structures chosen by the state also respects the limits of judicial competence. District lines for a federal or state legislative body serve only as units of representation. A strict standard for assessing the validity of a legislative apportionment does not entangle a court in essentially political judgments about how the legislature ought to exercise its powers. In a case such as this, however, the use of pre-existing boundaries is not simply a matter of convenience; a direct relationship exists between (on the one hand) the Board's formation, powers and operations and (on the other) the historic, geographic and political boundaries of the boroughs. Examining alternative boundaries or alternative structures for a body like the Board will inevitably require a court to make judgments about such highly political matters as the efficacy of regional governments, the nature and impact of the powers they hold, and the compromises needed to form and operate them successfully. In other words, the courts would be making judgments not about apportionment but about governance.

Moreover, in a case like this, deference to state policies makes even more sense because no judicial decree can fully assure the relief appellees seek. In a legislative apportionment case, a court can always order the legislature to reapportion so as to equalize voting power. Here, however, nothing in the Constitution requires the State of New York to compose the Board with elected

officials. Nothing now bars the State from deciding, in the face of the judgment below, that the Board shall be comprised of one representative from each borough whom the mayor (or borough presidents) shall appoint. *See Sailors* v. *Board of Education, supra*, 387 U.S. at 110-11 (states not obliged to provide for elections of non-legislative local government units). Thus, judgments like the one below may simply summon the use of insulated public authorities and other undemocratic appointive bodies to achieve the compromises which the elective body was designed to achieve.[4]

The lower courts' failure to recognize the special nature and needs of sub-state institutions infects the whole of their approach to this case. Confronted with a unique electoral design unsuited to the conventional tools of apportionment analysis, the courts simply bypassed the Board's unusual characteristics and treated the body as if drawing lines for a federal or state legislative district. Thus the courts disregarded the Board's most central feature—the majority control vested in its city-wide members. Because the courts below did so, they calculated a deviation from perfect equality that bears no relationship to the reality of the Board (See section B below). Moreover, the courts below adopted a test—the "least restrictive alternative" test—which has never been applied by this Court in judging deviations in local governmental bodies. That test is entirely inappropriate here because it effectively gives no weight to legitimate state policies that might justify deviations from strict voter equality (See section C below).

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4. Our claim that an overly rigid application of the one person, one-vote principle will simply shift the powers of sub-state institutions to unelected entities is not idle surmise. Among the proposals made in the wake of the judgment below was the transfer of the Board's exclusive powers to appointive agencies. *See* Preliminary Recommendations of the New York City Charter Revision Commission, Memorandum to Commission Members, March 28, 1988; *compare Oliver* v. *Board of Education*, 306 F. Supp. 1286 (S.D.N.Y. 1969) (invalidating elective system for 10-member City Board of Education comprised of two representatives from each borough) with N.Y. Educ. Law § 2590-b (McKinney 1981) (after *Oliver*, substituting appointive system).

B. The Courts Below Erred in Refusing to Assess the Representation Afforded to City Residents through their City-Wide Representatives.

In determining whether the Board's composition and voting structure comply with the equal protection clause's one person, one vote principle, the courts below ignored the Board's city-wide members and their six majority votes and determined the issue as if the Board contained only the borough presidents. No decision of this Court supports such a view. The injury appellees allege is that the law denies them, as Brooklyn residents, the same power to elect the Board of Estimate which the residents of Manhattan, the Bronx and Staten Island allegedly enjoy. The law, however, allows each voter three representatives with two votes on the Board, plus another representative with one. A litigant cannot show a denial of equal protection of law by reference solely to some of the protection the law actually provides. So, here, appellees cannot show that the law discriminates against their voting rights in electing borough representatives on the Board without regard to whether their opportunity to elect the at-large representatives substantially repairs any disparities borough representation may occasion.

The reason is obvious. The two so-called "components" on the Board, local and at-large, do not hold any government powers as separate "components." Whatever powers members of each "component" hold, as Board members, reside in the entire Board; the Board members exercise Board powers not as "components" but only as a full Board. Thus, it is impossible to divorce a voter's opportunity to elect a borough president who sits on the Board from the same voter's opportunity to elect other representatives who also sit there. Weighing a voter's chance to elect a "component" that alone has no power is a meaningless exercise.

The courts below engaged in this meaningless exercise in part because, in the words of the District Court (A180-81, n.11), the city-wide Board members have "preordained" powers which are "manifestly demarcated" from those of borough presidents. That the city-wide officials (as well as the borough presidents)

have responsibilities other than as Board members does not, however, change the fact that the Board's membership cannot exercise the Board's powers except as one body. And because the Board can operate only as one body, a citizen's relative voting strength to elect the Board must take account of that citizen's opportunity to vote for all his or her representatives on the Board.[5]

Nor is it an answer to say, as the lower courts did, that the city-wide officials and the borough presidents represent different "interests." This *ipse dixit*—a profound misconception both of the concept of regionalism and of the actual role of borough presidents as bridges between the City and local communities—is no excuse for ignoring the source of the constitutional injury appellees assert. That injury cannot stem from an abstraction about different "interests"; it derives, if anywhere, from the Board's exercise of government power. And, as noted, the borough presidents and city officials do not exercise any of the Board's power as separate units.

The decision of this Court upon which the lower courts relied—*Abate* v. *Mundt*, *supra*, 403 U.S. 182—does not support the result they reached. That case involved an apportionment plan for multi-member districts in a county legislature. The plan had no at-large members or weighted votes, and, this Court noted that plaintiffs had failed to show that multi-member districts affected voting strength. *Id.* at 184 and n.2. In consequence, the Court held that a comparison of the populations in each district against an "ideal" district with perfect equality could properly measure relative voting power. But nothing in the case purports to impose that method on all other cases or to disapprove the use of different standards to assess different governing bodies. To the contrary, this Court's cases have instead "been noteworthy for the

5. *See Andrews* v. *Koch*, 528 F. Supp. 246, 250 ns. 6 & 7 (E.D.N.Y. 1981), *aff'd w/out opin.*, 688 F.2d 815 (2d Cir.), *aff'd mem. sub nom.*, *Giacobbe* v. *Koch*, 459 U.S. 801 (1982) (citizen's right to elect both at-large and district members must be computed together because members exercised power only "as one body").

nonpromulgation of strict mathematical tests," "especially concerning units of local government." *See League of Women Voters* v. *Nassau County Board of Supervisors*, 737 F.2d 155, 171 (2d Cir. 1984), *cert. denied sub nom.*, *Schmertz* v. *Nassau County Board of Supervisors*, 469 U.S. 1108 (1985) (emphasis in original).[6]

This policy is wise. To require a single yardstick for measuring a state's consideration of population is to confine the states to choices in sub-state government which only that yardstick can measure. However logical the *Abate* method may be in assessing relative voting power in a one-dimensional body, it makes no sense to apply that method to a multi-dimensional body combining officials elected at-large who control a majority of the body's voting strength with officials elected from districts who hold equal votes.

The analysis of the courts below leads to entirely illogical results. For example, suppose a system in which the city-wide representatives each had 100 votes and the five borough representatives had 10 votes each. Under the analysis of the courts below, this system would be unconstitutional even though no borough representative has the power to affect any vote of the Board.

Or, using the same analysis (that is, ignoring the city-wide votes and measuring deviations entirely based on the populations of the boroughs without regard to the real voting power of the representatives), it is quite easy to have weighted-voting systems

6. As Judge Newman recognized in his concurrence below, none of the other cases relied upon by the majority mandates its conclusion (A49). In none of those cases was the issue of measuring at-large members raised or decided. In none of the cases, moreover, did the at-large members control a majority of the governing body. *See Avery* v. *Midland County*, *supra*, 390 U.S. at 476 (one at-large member with voting power only in event of a tie); *Markoe* v. *Legislature of Virgin Islands*, 592 F.2d 188, 190-91 (3d Cir. 1979) (one at-large vote of fifteen); *Perry* v. *City of Opelousas*, 515 F.2d 639, 641-42 (5th Cir. 1975) (one of six); *Latino Political Action Comm., Inc.* v. *City of Boston*, 568 F. Supp. 1012, 1015 (D. Mass.), *stay denied*, 716 F.2d 68 (1st Cir.), *stay denied* 463 U.S. 1319 (1983) (Brennan, J., in chambers) (four of thirteen); *Cohen* v. *Maloney 410 F. Supp. 1147, 1149 (D. Del. 1976)* (five of thirteen); *Martin* v. *Venables*, 401 F. Supp. 611, 613 (D. Conn. 1975) (one of eleven).

which would satisfy the test of the courts below but would still give the borough presidents equal voting power.

Suppose each of the city-wide officials casts 50 votes and the borough presidents together cast 51 votes weighted in exact proportion to the populations of their respective boroughs:

Brooklyn	16.1
Queens	13.6
Manhattan	10.3
Bronx	8.4
Staten Island	2.6

Using the analysis and methodology of the courts below, such a system would be entirely acceptable. Yet in spite of the perfectly weighted votes, the voting powers of all the borough presidents are equal, as is the case under the present structure.

The supposed weighted-voting structure has 201 votes (3 x 50 plus 51 for the borough presidents). A majority (101 votes) that includes at least one borough president may be obtained either by (1) a combination of any two city-wide officials (100 votes) and *any one* borough president or (2) a combination of any one city-wide member (50 votes) and *all five* borough presidents (51 votes). Thus, under the supposed weighted-voting structure, each borough president has voting power equal to the other. No one of them can affect the outcome more or less than any other, even though each has a different weighted vote (one that is proportional to the borough's population). Many other weighted-voting structures would lead to the same result.

No doubt if such a weighted-voting system were to be suggested, appellees would claim it was unconstitutional. And they would do so based on an analysis of voting power similar to the one rejected by the courts below. That is why, in suggesting weighted-voting schemes during the second stage of the proceeding in the District Court, appellees themselves did not use the analysis adopted by the District Court during the first stage (and by the Court of Appeals) but instead suggested an analysis based on the real voting powers on the Board (JA 535, see also JA 536,

539-43, 555-58). This analysis—the Banzhaf Index—provides a cogent and realistic way of assessing the representation on the Board of Estimate afforded to citizens of each borough. The analysis is straightforward and logical and not "metaphysical" or even "inconvenient" (compare A131 and 161-62 [District Court] and A13 [Court of Appeals]). In any event, it is an exercise that must be undertaken to obtain an accurate measure of alleged disparities when applying the equal protection clause to a body such as the Board of Estimate.

The Banzhaf Index measures the voting power of each citizen by (1) calculating the voting strength of each official for whom a citizen can vote, (2) determining the citizen's ability to affect the election of each such official, (3) adding together the complete voting power each citizen thus holds, and (4) thereby comparing the resulting voting strength of each citizen.

The first step is straightforward. On the Board as presently constructed, there are 552 possible voting combinations in which any one member can affect the outcome of a vote. Each borough president can cast the determining vote in 48 of these combinations (giving him or her a "voting power" of 8.7%). Each city-wide member can cast the determining vote in 104 of 552 combinations (giving him or her a "voting power" of 18.84%) (A40-41).

The next step is to determine the voting power each citizen derives through each of the representatives he or she votes to elect. One might be tempted here simply to divide the representative's "voting power" by the number of people who are represented. That simple division, however, presumes that each person's ability to affect the outcome of an election decreases proportionately with the number of voters. In fact, as explained by Professor Banzhaf, as a mathematical matter, the individual's power to affect the outcome of an election decreases in proportion to the square root of the number of voters.[7] See Banzhaf, *Multi-*

7. We quote here Professor Banzhaf's own explanation for this proposition set forth in his *amicus* brief to the Court of Appeals (page 15, n. 17):

> It is easy to prove that in situations where each person (legislator or citizen-voter) has one vote, his or her ability to cast a critical or decisive

Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle, 75 Yale L.J. 1309, 1319-23 & n.28 (1966); *See generally* Banzhaf, *One Man, ? Votes; Mathematical Analysis of Voting Power and Effective Representation*, 36 Geo. Wash. L. Rev. 808 (1968); Banzhaf, *One Man, 3,312 Votes, A Mathematical Analysis of the Electoral College*, 13 Vill. L. Rev. 303 (1968); R. Dixon, *Democratic Representation—Reapportionment in Law and Politics*, 541-42 (1968).

Thus, using the Banzhaf Index, the voting power of a Brooklyn voter can be calculated as follows:

$$\frac{\text{Voting Power Mayor (18.84\%)}}{\text{Square root of City pop. (2659)}} + \frac{\text{Voting Power Compt. (18,84\%)}}{\text{Square root of City pop. (2659)}} + \frac{\text{Voting Power City Council Pres. (18.84\%)}}{\text{Square root of City pop. (2659)}} + \frac{\text{Voting Power Bklyn Boro. Pres. (8.7\%)}}{\text{Square root of Brooklyn pop (1494)}}$$

vote doesn't decrease linearly (proportionately) with the number of people voting. Where the number of persons voting is small, one can calculate by hand the total number of voting combinations, and the number (and percentages) in which each person can cast a critical vote. For example, if only 3 people vote, and each has only one vote, there are 8 possible voting combinations, and each person can cast a critical vote in 4; i.e., in half of the voting combinations, a change of the vote of a single legislator will change the outcome. For somewhat larger numbers, the results are as follows:

Column 1 Number of Persons Voting	Column 2 Total Number of Voting Combinations	Column 3 Number of Combinations Where a Person Casts a Critical Vote	Column 4 Percent of Combinations Where a Person Casts a Critical Vote
3	8	4	48 = 50%
5	32	12	12/32 = 37.5%
7	128	40	40/128 = 31%
9	512	140	140/512 = 28%

As shown above, if the number of voters increases from 3 to 9 (a factor of 3), relative voting power doesn't decrease by a factor of 3 (50% divided by 3 = 16.7%), but rather approximately by the square root of 3 (which is 1.732): 50% divided by 1.732 = 28.9%. For larger numbers of voters, voting power can be calculated by using Stirling's Formula, and is found to decrease according to the square root of the number of persons voting. For a more detailed explanation, including the precise formulas, see Banzhaf, Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle, 75 Yale L.J. 1309, 1320-24 (1966).

The following chart makes this calculation for a voter in each of the five boroughs as well as for a voter in an "ideal" borough with the average population of 1,414,206. The chart shows an average and maximum deviation from the ideal of 7.4% and 30.8%, respectively:

Borough (Population)	Square Root	City-Wide Voting Power	Borough Voting Power	Total Voting Power	Deviation
Brooklyn (2,230,936)	1494	.021256	.00582	.0271	−5.15%
Queens (1,891,325)	1375	.021256	.00632	.0276	−3.35
Manhattan (1,427,533)	1195	.021256	.00728	.0285	−0.25
"Ideal" (1,414,206)	1189	.021256	.00731	.0286	0.00
Bronx (1,169,115)	1081	.021256	.00805	.0293	+2.55
Staten Isl. (352,121)	593	.021256	.01467	.0359	+25.65
		Total Deviation:			30.8
		Average Deviation:			7.4

The Court of Appeals did not find fault with the mathematical theory upon which the Banzhaf Index is based. Nonetheless it rejected the Index as "insufficiently realistic". This criticism is based on the fact that the Index weighs voting strength on the Board as if all the Board's voting combinations are equally likely.

It is true, as the Court of Appeals said, that the Index does treat all votes as equally weighty and does not not attempt to weigh the effects of parties, race, voting blocs, or other intangible factors that can influence voting combinations on a particular governing body; no mathematical formula can take account of those imponderables. The same may be said of all the more conventional tools in apportionment analysis, including, as the Court of Appeals itself recognized (A34), the tool adopted by it. None of these tools attempts to measure the obvious differences, say between, on the one hand, the weight of a citizen's vote for a state representative who is a freshman member of a minority political party and, on the other, the weight of another citizen's vote whose representative happens to be Speaker. That the

Banzhaf Index thus follows the same course in treating all voters as equal and all voting combinations as equally likely only fortifies its utility as a neutral measure of relative voting power. It is appellees who must then show that, as a matter of fact, the intangibles of party politics, race, and the like, operate in the real world to increase the disparities the Index reflects.

Such is the proper lesson of *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), the case on which the Court of Appeals relied in rejecting the Index here. In *Whitcomb*, plaintiffs challenged a state plan for a state legislature that included multi-member districts. They invoked the Banzhaf Index to show that, in theory, electors in multi-member districts had greater voting power than their counterparts in single-member districts. The Court understood that acceptance of this theory might mean, contrary to the Court's prior holdings, that multi-member districts were *per se* illegal (403 U.S. at 142-43; 147). The Court was understandably reluctant to so rule without a much deeper exploration of the ways in which multi-member districts operated throughout the country (403 U.S. at 147). Thus, in declining to hold multi-member districts *per se* illegal, this Court did not quarrel with the Banzhaf theory or its mathematics, but held only that, on the record before it, the theory was insufficient to show that "real-life impact" of multi-member districts discriminated among voters.

This case is very different. Here we invoke the Index not to destroy a government structure which should have a strong presumption of constitutionality but to defend one. We urge the Index's use to analyze a complex institution because other methods, and specifically the one adopted by the Court of Appeals, do not accurately reflect the reality of the institution. The Court of Appeals criticized the Index because it is more complex and less "convenient" than the method chosen by that Court. However, simplicity and convenience are not always virtues especially when, as here, they submerge the reality of the institution being judged. "Convenience", as seen by the courts below, would mean that local governments would have to foreswear flexibility and experimentation and fit themselves into a preordained "simple"

mold. The very real interests that a locality has in its form of government would be sacrificed to satisfy the mandates of a wholly-artificial arithmetical construct.

We do not suggest that the Index's use is appropriate in every case. It is sufficient that in this case the formula produces a reasonable explanation of the Board's voting system.[8] The results obtained from the Index in fact make sense. As may be expected, the deviations from strict voter equality are substantially less than what the courts below found, because those courts did not account for the majority city-wide votes. In addition, the Index expresses in arithmetical terms what may be seen by the naked eye. The Board's blending of city-wide and borough votes gives substantial deference to the principle of majority rule. The Board's powers cannot be invoked without the concurrence of officials elected by the majority of the citizens. See pp. 11-12, *supra*. As we show in section C below, in these circumstances, and giving due regard to the flexibility properly allowed to local governments, the state's legitimate interests justify the deviations—correctly calculated—from strict voter equality.

C. The Board of Estimate Embodies a Rational Plan for Regional Government that Promotes Legitimate Policies. Those Policies Amply Justify the Deviations from Perfect Equality in the Board's Voting Structure.

That a state may justify deviations from strict voter equality is clear. "Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the equal protection clause of the Fourteenth Amendment the mathematical formula that establishes what range of percentage deviations is permissible, and what is not."

8. Other courts have sustained the use of Professor Banzhaf's "voting power" principles to design constitutionally-acceptable weighted-voting structures. *See, League of Women Voters* v. *Nassau County Board of Supervisors, supra*, 737 F.2d at 170; *Franklin* v. *Krause*, 32 N.Y.2d 234, 298 N.E. 2d 68, 344 N.Y.S.2d 885 (1973), *appeal dismissed for want of a substantial fed. question*, 415 U.S. 904 (1974); *Iannucci* v. *Board of Supervisors*, 20 N.Y.2d 244, 251-54, 198-200, 282 N.Y.S. 2d 502, 507-10, 229 N.E. 2d 195, 198-200 (1967).

Mahan v. *Howell, supra,* 410 U.S. at 329. From the beginning of its one person, one vote jurisprudence, this Court has said that a state may depart from strict voter equality based on "legitimate considerations incident to the effectuation of a rational state policy." *Reynolds* v. *Sims, supra,* 377 U.S. at 579. Indeed, in *Mahan,* this Court expressly rejected the lower court's adoption of a mathematically more perfect plan and did so precisely because the existing plan rested on legitimate state policies. 410 U.S. at 320, 329-30. No decision of this Court has purported to place any specific deviation beyond justification.

Brown v. *Thomson, supra,* 462 U.S. 835, so confirms. That case involved the apportionment of Wyoming's House of Representatives. Counties in Wyoming had historically served as units of local government (in much the same way as boroughs served in New York). Under the Wyoming constitution, each county was required to be represented in the legislature by at least one senator and one representative. The least populous of Wyoming's counties, which would not have been entitled to its own representative based on population alone, had had its own representative in the legislature since 1913 (twelve years after Staten Island first had a representative on the Board of Estimate). As a result of requiring at least one representative for each of Wyoming's 64 counties, Wyoming had an apportionment plan with a maximum and average deviation of 89% and 16%, respectively. The least populous county had a population which was (as Staten Island's is) less than half the population of the supposedly "ideal" district.

Because the plaintiffs in *Brown* had limited their challenge to the dilution of their voting power resulting from the one representative given to the smallest county, the Court focused on the incremental deviation caused by the provision of that one representative. It was this incremental increase—which amounted to 34%—that the Court found justified by the State policies.[9] In

9. A 63-member plan, without the representative for the least populous county, would have had a maximum deviation of 66%. The 64-member plan, with the representative, had a maximum deviation of 89%. 462 U.S. at 846-47. The percentage increase was 34% (89% - 66%/66% = 34%).

weighing the avowed interests underlying deviations from mathematical perfection (there, the desire to give each county at least one representative), the Court said that "substantial deference is to be accorded the political decisions of the people of a State acting through their elected representatives." 462 U.S. at 847-48; see *Swann* v. *Adams,* 385 U.S. 440, 442, 444 (1967) (deviations of 26% and 34% in state legislature improper absent justification).

The state policies that justify the present structure of the Board are at least as compelling as those found sufficient in *Brown.* Most importantly, the Board is justified by the State's legitimate interest in fostering a stable, effective regional government.

Regionalism has been one of the major challenges for New York in this century. The interdependence of activities within a metropolitan area—the demand for housing, roads, garbage disposal, security, services—requires area-wide institutions to perform certain government functions (JA514-15). Yet an equally valid public policy and a political reality confront a state in shaping such sub-state units to address regional needs: People want some control over their affairs; they demand a say on matters closest to home; they insist on the right to participate in decisions that will affect their community. Moreover, there is the continuing fear, which must be assuaged if regional government is to work, that the smaller components of a regional federation will become the sites for the region's most noisome activities, like garbage disposal plants and prisons. It is reasonable for a state to determine that the benefits of pooling resources—bringing together Manhattan's huge tax base, Staten Island's large tracts of undeveloped land, the manufacturing and port facilities of Brooklyn, the residential communities of Queens and the Bronx—require some political adjustment to induce the people of each community to join and work in harmony.

For nearly a century the Board of Estimate has been the government institution which New York State has chosen to accommodate these many interests and to resolve the conflict between regional needs and the traditions and policies of home rule.

"Throughout the city's history," as appellees' expert wrote, "the Board of Estimate has been the principal body where this conflict, and, most significantly, the resolution of the conflict, has been deliberately institutionalized" (JA73). After nearly a century, "[t]he conflict between city-wide and local priorities, which necessitated the creation of the Board of Estimate, still exists" (*Id.*).

The District Court found, and the Court of Appeals did not dispute, that the Board of Estimate has been effective and efficient in its tasks (A87-90). Its success, however, is largely attributable to the very structure which, if the decree below stands, must be undone. The Board is small; it is made up of the region's highest elective officials; its borough representation respects historic and geographic boundaries as well as governmental structure now firmly woven into the City's fabric; and the equality of borough president votes and the blending of majority votes for the city-wide officials promotes collegiality and consensus and accounts for both the overriding regional and also the local interests.

Each one of these facets of the Board is supported by reasonable state policy and may be justified standing alone. Together they offer a compelling justification for the maintenance of the Board's present structure. Many of the decisions entrusted to the Board, like approving contracts or hearing appeals from zoning decisions or determining the appropriate use of a particular parcel of land, would be inappropriate for a large body. According to appellees' own expert, the "organic need for a small, elected body responsible for setting policy on matters relating to the city and its people has always been reflected in past charter revisions" (JA 163), with the result that the Board's size has not changed since 1901.

The use of boroughs as elective districts is surely justified as respecting historic, geographic and political subdivisions. Borough representation is rational because borough units are large enough to check the central authority, yet small enough to allow meaningful expression of local interests. The borough presidents

provide a local voice on decisions which have local impact. The state placed the Staten Island Borough President on the Board of Estimate not because it seemed a nice way to form a district. Rather, it was (among other reasons), that the use of land in Staten Island is controlled by a central authority whose decisions about the land peculiarly affect the people there. This Court has already said that respect for such historic and geographic subdivisions could justify deviations from strict voter equality. *Brown* v. *Thomson, supra,* 462 U.S. at 847-48; *Mahan* v. *Howell, supra,* 410 U.S. at 321-22; *Davis* v. *Mann,* 377 U.S. 678, 686-87 & n.2 (1964); *Reynolds* v. *Sims, supra,* 377 U.S. at 580-81.

Likewise, the granting of an equal vote to each borough president serves several important state policies. It fosters collegiality and facilitates the ability and willingness of members to achieve consensus. It assures the powerful expression of local interests on matters of peculiarly local concern. It also encourages the borough presidents to understand and care about city-wide problems so as to be able to articulate them within his or her borough. Finally, an equal vote for each borough president insures a meaningful voice for the lesser-populated boroughs. Recomposing the Board strictly according to population would reduce the president of Staten Island (and its residents) to a bystander in the Board's processes (JA 404-499). Appellees' own expert so opined (JA 166-67) as did every other expert with experience in city government (JA 444-45, 463, 510-11).[10]

But examining the many facets of the Board—each of which is supported by a rational state policy—misses a larger point. The Board has played a central role in the history of New York City. It has resolved the tension between local and regional needs and

10. It is no answer to argue that, prior to 1958, Queens, Staten Island and the Bronx had only one vote, while the other two boroughs had two. *See* pp. 12-13, *supra*. The structure of borough government as well as the Board's powers have undergone substantial changes since the state equalized the voting strength of the borough presidents. No one suggests a return to the pre-1958 formula, which would be subject to the same challenge as the present formula. And, whatever the pre-1958 arrangements, they were superseded almost thirty years ago by borough president equality which fosters collegiality and consensus. Apportionment according to population alone would destroy these dynamics.

has thus facilitated the city's growth and development. It has been able to do so because its structure gives voice to the smaller units but ultimate control to the majority. New York has a rational, legitimate interest in continuing this successful experiment.

The courts below did not respect these important state interests. They did not ask, as they were required to do, whether it could "reasonably be said that the [state] polic[ies] [are] furthered" by the Board of Estimate's voting structure. *Mahan* v. *Howell, supra,* 410 U.S. at 326. Rather the courts looked at hypothetical compositions and voting structures for the Board. If, as the District Court found, there existed a hypothetical structure which caused lesser deviations from strict voter equality, then the State's policy choices which led to the present structure had to be discarded.

The use of this "least restrictive alternative" analysis to assess state interests in local governing bodies (A38-39) is unsupported by any decision of this Court. The two cases on which the lower courts principally relied for this theory—*Karcher* v. *Daggett, supra,* 462 U.S. 725 (1983), and *Connor* v. *Finch,* 431 U.S. 407 (1977)—are inapposite. In *Karcher,* this Court held that a state must adopt the least restrictive alternative among congressional apportionment plans in order to satisfy the absolute equality standard applicable in such cases; yet in *Brown* v. *Thomson, supra,* 462 U.S. 835, decided the same day as *Karcher,* this Court did not apply that same test in the context of a state legislative apportionment plan, in which a less stringent standard of equality applies. Likewise, in *Connor,* which involved a court-imposed apportionment plan for a state legislature, this Court expressly ruled that "a court will be held to stricter standards in accomplishing its task than will a state legislature." 431 U.S. at 414. No decision of this Court purports to impose such a standard on state plans for state legislatures, let alone for local governments.[11]

11. *Kilgarlin* v. *Hill,* 386 U.S. 120 (1967) (per curiam), on which the Court of Appeals also relied in endorsing this test (A38), is especially inapposite. No reference to a least restrictive alternative test appears in that decision, which involved a Texas state legislative apportionment. This Court held there only that Texas policy frequently violated county lines and thus use of county boundaries did not justify significant deviation from voter equality. *Id.* at 123-24 and n.2.

The lower courts' ruling is also bad policy. Within the framework of majority rule and reasonable voter parity, many electoral options are theoretically available to a state in designing its local governments. This Court has repeatedly cautioned that local governments should be allowed to experiment. The point of that admonition is to permit the states substantial leeway in choosing among options. A state should thus be free to choose whichever option it regards as best-suited to its needs, provided only that the choice rests on valid policies, achieves reasonable voter parity and does not permit minority rule. To hold that a state must choose only the option resulting in the least deviation from arithmetical perfection is to eliminate the flexibility of states to adapt institutions to special situations, and transforms the equal protection clause into a "uniform straitjacket [to] bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems." *Avery* v. *Midland County, supra,* 390 U.S. at 485.

The three alternatives the court considered below—a proportional representation scheme, a residency rule, and an adjusted weighted voting system (A38-39, 101, 106-07)—highlight the danger of judicial intrusion into policy decisions involving substate governments. The proportional voting scheme—creating a 19-person board to be filled by election from single-member districts—has been explicitly rejected in past studies of city government, and precisely because the scheme would destroy all the policies the Board's structure seeks to achieve. Such a plan would eliminate the regional perspective the city-wide officials bring to the Board, expand the Board to an unwieldy size unsuited to its purposes, allow the citizens of Brooklyn and Queens alone to set city priorities, remove borough governments and presidents as unifying forces in city governance, erase the importance of the historic and geographic boundaries of the boroughs, and frustrate the city's ability to provide cohesive government.

The other alternatives likewise engage the court in second-guessing the State on how best to delegate state powers. The residency rule plan [see, *Dusch* v. *Davis, supra,* 387 U.S. at 114-15]—a scheme whereby the whole City would elect each borough president—overlooks the enormous cost of city-wide elections, the bias against members of minority groups such a plan might create, and the ability of strong political organizations in the large boroughs to control the election in other boroughs. And any revised weighted-voting plan—assigning different numerical votes to each borough president while increasing the votes of the city-wide officials—will have one of two results: Either it will give the borough presidents essentially the same voting power they have now (see pp. 33-34 *supra*); or it will interfere with the State's judgments (1) about the political accommodation needed to repose specific powers in the Board and (2) about the proper balance between local and city-wide perspectives necessary to achieve consensus on city priorities.[12]

Appellees' search for an alternate scheme is misguided. The Board of Estimate's current composition and voting system is the electoral design which best serves the State's legitimate objectives in a manner least restrictive of the voting rights of New York City residents. The State might have decided to give city-wide officials only one vote, or as we have noted, to provide for an appointive body. But the Board's present structure is instead tailored to assure majority control while paying heed to other very important state policies. At the same time, the system chosen by the State achieves reasonable parity among voters.

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12. After first claiming in the District Court that weighted voting among borough presidents was "unacceptable" (JA208), and then putting forward weighted-voting schemes as alternatives (JA565-69), appellees appear now to have suggested that adoption of any such weighted-voting scheme would violate the Voting Rights Act of 1965, §§ 2 and 5, 42 U.S.C. §§ 1973 and 1973 (c). See *The New York Times*, February 21, 1988 at B-1, col. 1. Their theory is that such a readjusted weighted-voting scheme would dilute the voting power of the presidents of the two boroughs that have elected members of minority groups to the Board. The current Manhattan Borough President is black; the Bronx Borough President is Hispanic.

In deciding whether the Board's makeup is faithful to the Constitution, a court cannot scan the universe of untested government schemes to see if another better fits New York. The State of New York is entitled to substantial deference in organizing its internal structures. The Board of Estimate's structure rests on wholly neutral and legitimate policies, assures majority rule, and does not create disparities among voters—properly computed—of greater than 31%. The record thus shows that the Board of Estimate's design "may reasonably be said to advance . . . rational state policy" and that the "population disparities among the districts that have resulted from the pursuit of this plan" do not "exceed constitutional limits." *Mahan v. Howell, supra,* 410 U.S. at 328.

CONCLUSION

When it applied the "one person, one vote" rule to local governments, this Court cautioned that the application of that rule should not serve to frustrate the ability of municipalities to fashion innovative responses to their myriad needs and responsibilities. *See, e.g., Avery v. Midland County, supra,* 390 U.S. at 485. The decisions below—in failing to consider the special nature of the Board of Estimate, in ignoring the city-wide component of representation on the Board of Estimate, and in applying a "least restrictive alternative" analysis to the policies advanced by the Board's voting structure—can serve only to place a straightjacket around local governments. The courts below struck down a local government body that achieves substantial population equality and respects majority rule while assuring strenuous representation for local concerns. If left standing, the rulings below will make it more difficult for local elected bodies to meet local needs through innovative combinations of representation. Such result should not be countenanced.

The judgment of the Court of Appeals should be reversed and the case remanded with instructions to enter judgment declaring that sections 61 and 62 of the New York City Charter are valid.

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